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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

RAFAEL GARCILAZO,

Defendant and Appellant.

B285170

(Los Angeles County  
Super. Ct. No. KA111005)

APPEAL from a judgment of the Superior Court of Los Angeles County, Peter Hernandez, Judge. Affirmed.

Gusdorff Law and Janet Gusdorff for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Rene Judkiewicz, Deputy Attorney General, for Plaintiff and Respondent.

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A jury convicted Rafael Garcilazo of molesting four children. On appeal, Garcilazo argues (1) a jury instruction improperly highlighted the prosecution’s expert testimony, and (2) his trial counsel were ineffective because they did not object to prosecutorial misconduct. We affirm.

## I

We recount the facts in the light favorable to the prosecution.

One victim here was a child we call only G. Garcilazo began molesting G when she was six or seven years old and did not stop until G was around 16. At the time, Garcilazo was living with G, G’s brothers, and G’s mother, whom Garcilazo was dating. G considered Garcilazo her stepfather. Garcilazo also molested three other children—Elizabeth, A. Doe, and Leslie—many times when they visited G’s family home.

At trial, the prosecution and defense each called an expert witness. The prosecution’s expert was Jayme Jones. Jones’s testimony focused primarily on Child Sexual Abuse Accommodation Syndrome. According to Jones, this syndrome concerns “the circumstances in which abuse occurs and some of the behaviors that follow.” The syndrome explains children often do not “fight back” against an abuser, do not disclose abuse immediately, and do not “disclose in a way that tells the complete story from beginning to end.” Jones testified about other sexual abuse issues too, including suggestibility: the idea that suggestive questions or discussions can lead someone to believe a falsehood.

The defense’s expert was Bradley McAuliff. He testified about suggestibility only.

Over the objection of defense counsel, the trial court instructed the jury with CALCRIM No. 1193:

“You have heard testimony from Dr. Jayme Jones regarding child sexual abuse accommodation syndrome. Dr. Jones’ testimony about the child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against him.

“You may consider this evidence only in deciding whether or not [the alleged victims’] conduct was not inconsistent with the conduct of someone who had been molested and in evaluating the believability of their testimony.” (See CALCRIM No. 1193.)

The trial court did not give any instruction that specifically applied to McAuliff’s testimony on suggestibility, though it gave CALCRIM No. 332 on the use of expert testimony generally and CALCRIM No. 303 on evidence admitted for a limited purpose. Neither did the trial court give any instruction on that portion of Dr. Jones’s testimony on suggestibility.

## II

The trial court did not err by instructing the jury with CALCRIM No. 1193.

We independently review whether a trial court commits instructional error. (*Yale v. Bowne* (2017) 9 Cal.App.5th 649, 657.)

Garcilazo does not claim CALCRIM No. 1193 misstates the law or is inapplicable to these facts. Instead he argues the court violated his federal constitutional rights because it was not *required* to give the instruction. That argument is unconnected

to the relevant issue: whether the trial court was *permitted* to give the instruction.

Garcilazo also contends CAMCRIM No. 1193 emphasized portions of the prosecution's expert testimony—that children often delay reports of abuse—and thus deemphasized the defense's expert testimony: that children may erroneously report abuse when improperly questioned.

CALCRIM No. 1193 did not emphasize Jones's testimony to Garcilazo's detriment. Rather, it expressly limited the jury's consideration of Jones's testimony on Child Sexual Abuse Accommodation Syndrome for Garcilazo's benefit. We assume the jury understood the instruction and limited its consideration of Jones's testimony. (See *People v. Richardson* (2008) 43 Cal.4th 959, 1028 [courts assume jurors are intelligent and understand instructions].) If, as Garcilazo argues, the jury gave Jones's testimony extra credence, it would have been disobeying the instruction.

A trial court may err by instructing the jury with a legally correct but irrelevant instruction. (*People v. Lee* (1990) 219 Cal.App.3d 829, 841.) But Garcilazo does not, and cannot, argue CALCRIM No. 1193 is irrelevant. Jones testified about Child Sexual Abuse Accommodation Syndrome, and CALCRIM No. 1193 is an instruction on the proper use of just that sort of testimony.

Garcilazo cites no authority for the notion a legally correct and factually applicable instruction can prejudice a defendant. This notion is wrong.

Even if CALCRIM No. 1193 were irrelevant, a trial court's error in delivering a legally correct but factually inapplicable instruction is usually harmless and has little or no effect. (*People*

*v. Lee, supra*, 219 Cal.App.3d at p. 841.) Such an error would be merely technical and not grounds for reversal. (*People v. Eulian* (2016) 247 Cal.App.4th 1324, 1335.)

In reviewing a purportedly erroneous instruction, we ask whether there is a reasonable likelihood the jury has applied the instruction in a way that violates the Constitution. (*People v. Richardson, supra*, 43 Cal.4th at p. 1028.) An instruction must be viewed in the context of the overall charge, which we presume jurors grasp. (*Ibid.*)

Here, any error was harmless in light of the trial court's other instructions. The trial court instructed the jury with CALCRIM No. 332, which clarified the jury was "not required to accept [expert opinions] as true or correct." CALCRIM No. 332 also stated that, where experts disagree, jurors "should weigh each opinion against the others" and "examine the reasons given for each opinion and the facts or other matters on which each witness relied." And the trial court instructed the jury with CALCRIM No. 226, which guides jurors on how to judge the credibility of witnesses and informs jurors that they alone are responsible for credibility determinations. CALCRIM Nos. 332 and 226 sufficed to correct any misapprehension the jury may have had about how to use Jones's testimony and how to assess the victims' credibility. Any error in instructing the jury with CALCRIM No. 1193 was harmless.

### III

Garcilazo fails to establish his trial counsel were ineffective.

Garcilazo claims the prosecutor vouched for prosecution witnesses and improperly implied Garcilazo committed perjury. According to Garcilazo, this misconduct occurred at three points:

during the prosecutor's opening statement, during direct examination of a victim's mother, and during closing argument.

Garcilazo highlights that, during the prosecutor's opening statement and closing argument, the prosecutor made comments to the jury such as, "The fact that [the victims] were inconsistent on some of the details, *in my opinion*, is . . . suggestive of them being truthful . . ." Garcilazo claims the prosecutor engaged in similarly improper vouching while examining a victim's mother:

"A: And then she said that – and she said [A. Doe] and Leslie, they have gone through the same thing.

Q: Okay. That's the same thing you told the detective and I, when you interviewed with us a few months ago?

Interpreter: So sorry. You need to speak up a little bit.

By [the prosecutor]: That's the same series of events that you told the detective and I when you spoke with us a few months ago, correct?

A: Yes."

Garcilazo says the prosecutor improperly accused him of perjury when the prosecutor said in closing argument:

"[W]hen [defendants] choose to testify in a courtroom, their testimony can be examined and we know that he had – the defendant had – out of anybody in this case, he had the biggest motive to get up there and lie. What's perjury in comparison to the charges that you're facing? It's nothing. . . . He has the most motive to lie out of anyone because he's the one facing these charges."

On appeal, Garcilazo wisely chooses not to attack the jury's verdict based on the claimed prosecutorial misconduct itself. Any attack on that basis would fail because, absent special circumstances that do not exist here, counsel's failure to object at trial forfeits a claim of prosecutorial misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Instead, Garcilazo asserts a claim of ineffective assistance, faulting his counsel for failing to object to the prosecutor's remarks.

Garcilazo's argument lacks merit. When reviewing an ineffective assistance claim, we defer to counsel's reasonable tactical decisions and presume counsel acted within the wide range of reasonable professional assistance. (*People v. Mai* (2013) 57 Cal.4th 986, 1009 (*Mai*).) Typically, an ineffective assistance claim is best raised in a habeas corpus proceeding. (*Ibid.*) On direct appeal, we reverse a conviction only if (1) the record shows counsel had no rational tactical purpose for the challenged behavior, (2) counsel was asked for a reason and failed to provide one, or (3) no satisfactory explanation could exist. (*Ibid.*)

None of the *Mai* grounds for reversal are present here. The second ground is absent because Garcilazo's counsel were not asked why they did not object.

The first and third *Mai* grounds are absent too. Deciding whether to object is inherently tactical. The failure to object will rarely establish ineffective assistance. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502.) There are many possible reasons Garcilazo's counsel may have chosen not to object to the prosecutor's comments during her opening statement, direct examination of the victim's mother, and closing argument. The record refutes none of them. For instance, jurors' body language may have suggested boredom with or hostility to the prosecutor's

comments; defense counsel may have perceived the prosecutor's comments as opening a possible door; defense counsel may have wanted to end the discussion of witness credibility sooner rather than later; and so forth. Objecting in any of these situations would have been counterproductive.

We defer to counsel's reasonable trial tactics. There was no ineffective assistance.

**DISPOSITION**

The judgment is affirmed.

WILEY, J.

We concur:

BIGELOW, P. J.

STRATTON, J.